IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. _____

JOHNNY ESPINOZA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Notice is hereby given that Johnny Espinoza, the Appellant above named hereby appeals to the Supreme Court of the United States from the final order of the United States Court of Appeals, 5th Circuit, entered on the 1st day of July, 1960, when the Motion for Rehearing was denied. The original judgment was entered on the 5th day of January, 1960 in the District Court.

This appeal is taken pursuant to 28 *USC*, Sec. 1254 (1).

Appellant was convicted of illegally receiving and concealing a quantity of narcotics in violation of Section 174, Title 21, *U. S. Code*; and Appellant was sentenced to ten

years in prison. The Appellant is currently confined at the Federal Penitentiary, Leavenworth, Kansas.

This writ is sought primarily for the violation of the rights of the Defendant when he was arrested.

The main question presented by this Appellant is

1. The Court erred in overruling Defendant's Motion to Suppress Evidence in that the said Agents arrested the Defendant although there was no violation of any local or City Ordinances, State laws or the laws of the United States of America, and began an unlawful search of the Defendant, Defendant's person and automobile without the consent and permission of the Defendant and choked and abused the Defendant in the process.

The record is clear that the agents of the Government attacked the Defendant (R. 15 to 29-30) as shown by the testimony of agents Batista and Robinson; that the Agent Robinson grabbed Defendant by placing his arm around the Defendant's neck and pulling the Defendant as though he had him in a vise (R. 23-59) and dragged the Defendant out of Defendant's automobile (R. 59). It is equally clear that the agents had no warrants at any time and had not seen the Defendant violate any laws.

As evidence of abuse the Defendant's lip was cut and physical force applied to his nose (R. 15). Certainly there could be no illusion that the Defendant was mistreated and abused physically by the officers and it certainly should follow that any evidence obtained from the Defendant as a result of such treatment would be inadmissible in a trial against him.

The fact that the evidence subsequently recovered through such mistreatment did belong to the Defendant

(R. 35) did not change the statutes as to its being used against him when it was obtained in such a manner.

It is clear from the testimony that the Agents were after the Appellant although they had absolutely no evidence of any kind; in this connection your Petitioner would show this Honorable Court that the Agents herein stated they knew him but had never seen him violate any laws.

The Fourth and Fifth Amendments to the Constitution of the United States in reference to illegal search and seizure in due process of law were enacted to prevent such treatment and violence referred to herein. Certainly there was unlawful invasion of the sanctity of the Defendant from which unlawful invasion your Petitioner states he should be protected from by the Fourth and Fifth Amendments of the Constitution of the United States. *The Protection of the Fourth and Fifth Amendments of the Constitution of the United States of America should protect and reach all alike, whether accused of crime or not*, and the duty of giving it force and effect is obligatory on all entrusted under our Federal System for the enforcement of said laws. Certainly, this Court charged with protection of our citizens should give no sanction for such illegal practice performed by those who give so little regard to the rights of those under the laws of our land. The fact that the Defendant herein is of Mexican descent and had a reputation as a narcotics violator with the agents should have no bearing on the facts of this particular case. In this connection your Petitioner would refer this Honorable Court to the *City of Price v. James*, 191 P. 2d 606, 113 Utah 89, wherein it was held that the people's right recognized by the Fourth Amendment to the Constitution to be secure in their persons, houses, papers and effects against

unreasonable search and seizure was originally designed principally to protect citizens in their home from arrest or seizure of his papers and goods there from but immunity from search and seizure without lawful warrant, has been extended to unlawful seizures of persons not in their homes. In *Corpus Juris Secundum* under Searches and Seizures, Paragraph 17, Vol. 79, it states that Constitutional guarantees against unreasonable search and seizure are violated by the seizure of contraband or stolen goods if seizure is brought about by unlawful search and has been held that where the entry on the premises is illegal even though the Defendant may not complain of the illegality, a seizure of a contraband found there constituted a violation of the Constitutional guarantee. In this connection see *U. S. v. Jeffers*, App. D. C. 72 C. S. 93; 342 U.S. 48; 96 Law Edition. The *Jeffers* case was one where the owner of contraband stood in another's hotel room, the police entered the room illegally and seized the contraband, the owner's Constitutional rights were invaded. Applying that to the case at hand, whether it was the invasion of the room of the Defendant, or the person of the Defendant the officers would have to make such invasion with a lawful warrant, which in this case they failed to do. Of course, the question of illegality goes further in this case, due to the manner in which the officers obtained the contraband to-wit, the narcotics; in the case at bar, through the use of violence in attacking the person of the Defendant. A search of person except when made as an instrument to a lawful arrest or with invitation or consent must be made under a valid search warrant therefor. See *Corpus Juris Secundum*, Section 66, Subparagraph B, Volume 79 on Search and Seizures. Certainly in the case at bar neither of the above requisites would apply, as certainly there was no lawful

arrest and certainly there was no invitation or consent to be searched by the Defendant as evidenced by his desire to defend himself. The search of a person without a search warrant is not within the exception as mentioned above as unlawful.

The Court of Appeals based its opinion on *Draper v. United States*, 1959, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327. However, in the *Draper* case there was no violence used which clearly distinguishes it from the case at bar.

In view of the foregoing the trial finding of guilty should be reversed as should the decision of the United States Court of Appeals, 5th Circuit. Appellant herein prays that this Petition for Writ of Certiorari be granted.

ROBERT A. SCARDINO
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Houston 2, Texas

I, _____, Assistant United Attorney, hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to the Supreme Court of the United States this _____ day of _____, 1960.

_____

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 18190

JOHNNY ESPINOZA, Appellant,
versus
UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas

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(June 3, 1960)

Before HUTCHESON, BROWN and WISDOM, Circuit Judges.

PER CURIAM: Defendant (appellant here) was convicted in a trial before the District Court sitting without a jury of knowingly concealing and transporting narcotic drugs in violation of 21 USCA §174. He was sentenced to ten years. His conviction was based in part on the use in evidence of a quantity of narcotics found in his possession at the time of his arrest. Before trial, he moved to suppress that evidence, F.R.Crim.P. 41(e), as having been secured through a search and seizure asserted to have been unlawful for two reasons. First, the arrest, to which the search and seizure was

justified as being incidental, was illegal because it was made without a warrant. Second, the federal officers obtained the evidence from the defendant's mouth as he was attempting to swallow and destroy it by grabbing the defendant about the throat, choking him and attempting to pry open his mouth by placing pressure against his jaw and nose. After a hearing, the District Court found that the arresting officers had probable cause to arrest the defendant without a warrant and that no more force was used than was reasonably necessary under the circumstances. Accordingly, the Court held the search and seizure was incidental to a lawful arrest and overruled the motion to suppress. That ruling is the basis of this appeal.

The arrest of the defendant, a well known narcotics violator, on the basis of information received from a previously reliable informant—that the defendant definitely would be carrying narcotics—occurred under circumstances which gave the agents "probable cause" within the meaning of the Fourth Amendment and "reasonable grounds" within the meaning of 26 USCA §7607[1] to believe that the defendant had committed or was committing a violation of the narcotics laws. *Draper v. United States*, 1959, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327. Therefore, the arrest and incidental search and seizure was lawful.

---

1 "The Commissioner * * * and agents of the Bureau of Narcotics * * * may—

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs * * * where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation." 26 USCA §7607 (1959 Supp.)

The subsequent circumstances under which the narcotics were taken does not change this. When the defendant was confronted by the officers, he immediately grasped a small package either from his pocket or from the car seat and put it in his mouth. The officers recognized this as an attempt to swallow and destroy what to the officers appeared to be—and was in fact—a quantity of narcotics. The District Court held that in the officers' efforts to retrieve the article and to see that relevant evidence was not destroyed, *Abel v. United States*, 1960, U.S. , 80 S.Ct. , 4 L.Ed.2d 668, 685-686, "no more force was used than was necessary under the circumstances." *King v. United States*, 5 Cir., 1958, 258 F.2d 754, cert. denied, 1959, 359 U.S. 939, 79 S.Ct. 652, 3 L.Ed.2d 639; *Blackford v. United States*, 9 Cir., 1957, 247 F.2d 745, cert. denied, 1958, 356 U.S. 914, 78 S.Ct. 672, 2 L.Ed.2d 586 ;cf. *Rochin v. California*, 1952, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183. We affirm.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

_____TERM: 1960

NO._____

JOHNNY ESPINOZA

vs.

UNITED STATES OF AMERICA

ACKNOWLEDGMENT OF SERVICE

BE IT REMEMBERED that on this the_____day of _____, 1960, I, _____, Counsel of record for the United States in the above entitled and numbered cause, herein acknowledge service of the Petitioner's Writ of Certiorari, same having already been docketed in this Honorable Court, as Cause #_____. This is in conformity to Rule 33 (3) (a) regarding proof of service.

_____

Counsel of Record for the United States of America

No. 259

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOHNNY ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 259

JOHNNY ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 86–88) has not yet been reported. The opinion of the district court denying petitioner's motion to suppress appears at pages 75–76 of the record.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1960 (R. 89). A petition for rehearing was denied on July 1, 1960 (R. 94). The petition for a writ of certiorari was filed on July 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the seizure of the heroin from petitioner, following his arrest on probable cause, was reasonable.

STATEMENT

On January 6, 1960, after trial in the United States District Court for the Southern District of Texas, petitioner was convicted of violating the federal narcotic laws (21 U.S.C. 174), and was sentenced to ten years imprisonment as a second offender (R. 3, 77–78).[1]

Prior to trial petitioner moved to suppress narcotics seized from him following his arrest, asserting that the narcotics were obtained as a result of an unreasonable search and seizure (R. 4–8). After a hearing on his motion, the district court found that the search and seizure were incident to petitioner's lawful arrest on probable cause and therefore reasonable under the circumstances, and that the heroin seized was thus admissible (R. 75–76). In a *per curiam* opinion the court of appeals affirmed (R. 86–88).

The evidence presented on the motion to suppress may be summarized as follows:

1. Sometime between 8 and 9 p.m. on the night of June 24, 1959 (the evening preceding petitioner's arrest), federal narcotic agent Robinson received information from a reliable informant, who had previously worked with him in approximately ten cases, that

[1] He had previously been convicted on a narcotics charge in 1955, in the United States District Court for the Western District of Texas, San Antonio Division (R. 77).

petitioner would have heroin the next day to fill orders he had for it at his place of employment. The informant did not know if petitioner would pick up the heroin at home or elsewhere but did know that "when he got to work he would have it in his possession" (R. 52, 61, 68; see also R. 16–21, 24, 31). Agent Robinson further testified that he personally knew petitioner and had received information on previous occasions from two other reliable sources that petitioner was involved in the narcotics traffic (R. 62–66). Agent Battista, who, together with agents Robinson and Cerda, made the arrest of petitioner, testified that he had been advised that petitioner was a narcotics trafficker "for a long, long time" (R. 16); that he had received additional information to that effect about a week before the arrest; that he had kept petitioner under surveillance on previous occasions because of such information; and that he knew that petitioner had a "lengthy record" of narcotic convictions. He further stated that the "positive information"—the reliable informant's statement that petitioner would be possessed of heroin on the morning of June 25, 1959—was obtained the night before the arrest (R. 16, 19–21, 23–26).

2. At approximately 6 a.m. on the morning of June 25, 1959, agents Robinson, Battista and Cerda drove to the parking area adjacent to petitioner's place of employment (R. 10–11, 56–57). Shortly after their arrival, petitioner pulled into the parking area. The agents thereupon pulled alongside petitioner's car just as he was opening his door to get out (R. 13, 57).

Robinson then got out of the car,[2] informed petitioner he was a federal narcotic officer, and told him he was arresting him for a violation of the federal narcotic laws. At this point, petitioner pushed at the agent, tried to close the car door, and grabbed a white piece of paper containing white powder from the car seat and put it in his mouth (R. 57–58). Agent Robinson put his arm around petitioner's neck to prevent him from "swallowing the evidence." A scuffle ensued, and they both fell out of the car onto the ground (R. 58–60). Battista immediately went to Robinson's aid. He tried unsuccessfully to stick his finger into petitioner's mouth to keep him from swallowing the powder, but to no avail. He then placed his finger in petitioner's nose to force his mouth open (R. 15), and thus prevented petitioner from swallowing the powder. The powder dropped out from petitioner's mouth into his hand; petitioner thereupon threw away the powder which was immediately recovered by agent Cerda (R. 15, 60).[3] The officers had the powder field tested and found that it was an opium derivative (R. 66).

ARGUMENT

1. It is settled that police officers may search a person without a warrant and seize evidence so found, if the search and seizure are incident to a lawful arrest. See, *e.g.*, *Abel* v. *United States*, 362 U.S. 217; *Draper* v. *United States*, 358 U.S. 307, 311; *Agnello* v. *United*

[2] Agent Battista was driving, agent Cerda was sitting next to him and agent Robinson was sitting in the rear (R. 13).

[3] Agent Cerda did not take part in the struggle with petitioner. He had run around to the other side of petitioner's car to retrieve the powder thrown away by petitioner (R. 29–30).

States, 269 U.S. 20, 30; *Carroll* v. *United States*, 267 U.S. 132, 158. Unlike the situation in *Rochin* v. *California*, 342 U.S. 165, in which the officers' conduct was illegal from the time defendant was arrested without probable cause until the evidence was seized,* the narcotic agents in the present case had probable cause to arrest petitioner on June 25, 1959, for a narcotics offense because the agents not only had a general knowledge that petitioner was involved in narcotics traffic, but they also had received particularized information from a reliable informant the evening before the arrest that petitioner would have heroin in his possession the next day when he got to work. Compare *Draper* v. *United States*, *supra* at 312–313; *Brinegar* v. *United States*, 338 U.S. 160, 175. Once having placed petitioner under arrest, the agents were then authorized, as an incident to that arrest, to search the person of petitioner and seize the contraband heroin.

2. Moreover, the nature and extent of the search and seizure in the present case accorded with the standard of reasonableness in the Fourth Amendment, even if that standard be considered more stringent than the Due Process limitations delineated in *Rochin* v. *California*, *supra*, and *Breithaupt* v. *Abram*, 352 U.S. 432. There is no justification for petitioner's contention that the search and seizure went beyond the bounds of reasonableness because force was employed. It is established doctrine that one under law-

* In *Rochin*, after unlawfully breaking into the defendant's dwelling, the state agents "jumped upon him" and forcibly sought to extract narcotic capsules he had placed in his mouth, and, when this method failed, had his stomach pumped against his will in order to extract the narcotics.

ful arrest may be subjected to the force necessary to unlock his clenched fist (*Draper* v. *United States*, *supra* at 310), or to have relevant evidence taken from him which he has tried to hide up his sleeve (*Abel* v. *United States*, *supra* at 238). Similarly the police need not stand helplessly by in executing a lawful arrest, when the person arrested seeks to wash narcotics down the drain, or otherwise attempts to destroy or secrete such easily transferrable contraband. Cf *United States* v. *Kraus*, 270 Fed. 578, 582 (S.D. N.Y.). In *Blackford* v. *United States*, 247 F. 2d 745 (C.A. 9), certiorari denied, 356 U.S. 914, it was held that, after a legal arrest on probable cause, the removal of narcotics from the defendant's rectum by scientific procedures and under sanitary conditions was not an unreasonable search and seizure. See also *Barrera* v. *United States*, 276 F. 2d 654 (C.A. 5); *King* v. *United States*, 258 F. 2d 754 (C.A. 5), certiorari denied, 359 U.S. 939.*

The cases show that "[A]n arresting officer is free to take hold of articles which he sees the accused deliberately trying to hide. This power derives from the dangers * * * that relevant evidence will be destroyed." *Abel* v. *United States*, *supra* at 238. The cases also demonstrate that there is no hard and fast

* It is also established that if one forcibly resists lawful arrest, law enforcement agents may use such force as is necessary under the circumstances to effectuate the arrest. See, *e.g.*, *Bell* v. *United States*, 254 F. 2d 82, 85 (C.A. D.C.), certiorari denied, 358 U.S. 885; cf. *Costner* v. *United States*, 252 F. 2d 496 (C.A. 6). Similarly, federal law enforcement officers may employ force to gain entry to premises to execute a search warrant (18 U.S.C. 3109), or to arrest on probable cause (*Miller* v. *United States*, 357 U.S. 301), if, after announcing their authority and purpose, they are denied entry.

rule as to when and to what extent force may be applied in effectuating a search and seizure. Rather, they indicate that the question is whether a police officer or agent acted reasonably under all the circumstances. In the present case, when federal narcotic officers, having probable cause to arrest petitioner, lawfully did so during daylight hours in a public parking area, petitioner became violent and attempted to hide the evidence by swallowing it. In the face of this instantaneous resistance to lawful police activity, the officers justifiably used a minimum of force to prevent the destruction of the easily disposable, relevant evidence and to avoid the need for any medical procedures to extract the evidence.[6] No blows were struck and the scuffle terminated as soon as petitioner was prevented from swallowing the heroin (R. 60, 66). In short, the police action here was entirely reasonable under all the circumstances.[7] The courts below therefore properly ruled that the heroin was admissible in evidence.

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[6] It may well be that in preventing petitioner from swallowing the heroin, the agents protected his physical condition, for, as agent Robinson testified: "I thought he had swallowed more than one dram of heroin, and I knew if it dissolved in his stomach, it would kill him" (R. 66–67). Compare *Blackford* v. *United States*, *supra* at 747. After the seizure of the narcotics from him, petitioner was taken to a hospital but refused—a refusal which was honored—to have his stomach pumped (R. 67).

[7] Since the search and seizure were not unreasonable, there can be no question of any violation of the prohibitions of the Due Process Clause of the Fifth Amendment. And of course there is no merit to petitioner's contention that the use of the evidence violated his constitutional privilege against self-incrimination. See *Blackford* v. *United States*, *supra* at 753–754; 8 Wigmore, *Evidence* § 2264(2), at 364–372 (3d ed. 1940).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
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AUGUST 1960.

U. S. GOVERNMENT PRINTING OFFICE: 1960